FILED
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JOHN T. FEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 394

BERNARD F. KENNY,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

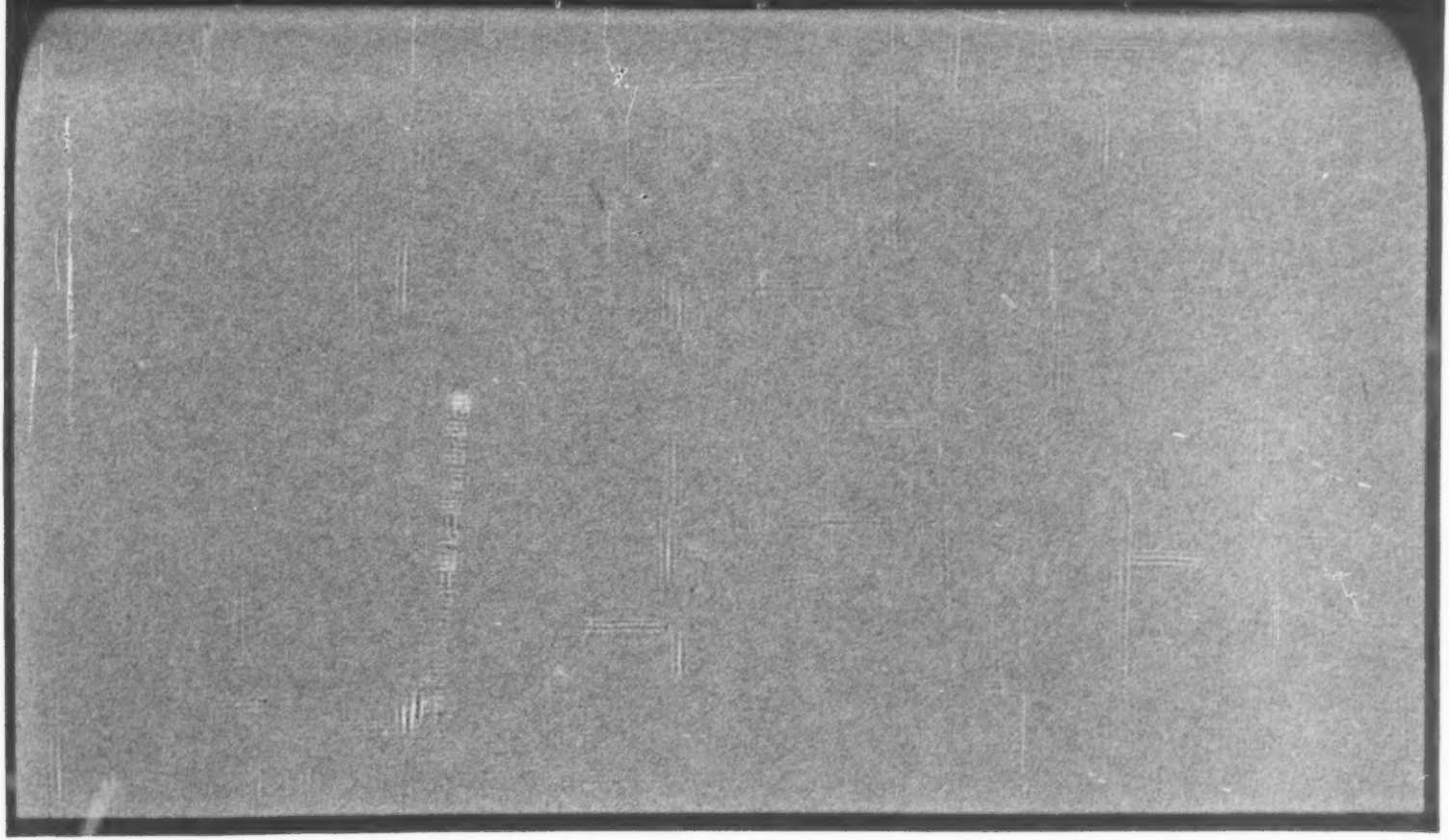
REPLY BRIEF FOR PETITIONER

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Reply Brief

This reply brief is submitted to underscore an obvious and fatal defect in the structure of the argument contained in the Government's brief.

The Government contends that there is a "manifest difference" in the criminal intent requisite under the first indictment and the intent requisite under the second (Resp. 7). The difference is "manifest", the Government claims, because under the first indictment petitioner's conviction rested on the intent of "another partner" whereas under the second indictment petitioner's "personal intent" had to be determined.

A review of the first indictment and of the statement of the Question Presented as it is cast in the Government's brief (Resp. 2) plainly indicates that under the first indictment as under the second, the petitioner's intent is the only person's intent relevant to his conviction.

The following is a running excerpt of the charge in Count I of the first indictment as it applies to the petitioner:

> ". . . BERNARD F. KENNY . . . did . . . knowingly, willfully and unlawfully make a false material statement and representation in an affidavit wherein . . . ANTHONY J. MASOLO . . . swore under oath, that no employee of the said local agency now or during the past year has or will have any interest direct or indirect in said claim, which statement and representation the said BERNARD F. KENNY . . . then and there well knew was false . . . "

There has never been any question in this case but that petitioner's alleged guilt under the first indictment is independent of the guilt or innocence of any of his co-defendants. The above quoted portions of the indictment are clear in this respect and as noted in the petition (Pet. 6)

the Court characterized petitioner's alleged crime under the first indictment as one of "knowledge and acquiescence."

While the Court below guessed that the jury had decided that the petitioner lacked the "requisite criminal intent" under the first indictment (Pet. 7), the Government now seems to suggest that that jury had never considered petitioner's intent at all when they acquitted him under the first indictment.

We respectfully submit that both the Court below and the Government have strained to avoid the only sound view of this case. The Government in its very statement of Question Presented states that the first indictment charged the petitioner with "wilful misrepresentation of [his] interest" while the second charged him with "having wilfully concealed his interest". Surely under the Government's own statement of the case it is obvious that the issue of concealment or misrepresentation and the issue of wilfulness are identical in both. Having once been acquitted, the petitioner should not have been tried again.

Respectfully submitted,

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